

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KENNETH B. ADAMS,

Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner  
of Social Security,<sup>1</sup>

Defendant.

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No. CV-11-0344-CI

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 13, 15. Attorney Maureen Rosette represents Kenneth Adams (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

**JURISDICTION**

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on July 24, 2009,

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<sup>1</sup> Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to FED. R. CIV. P. 25(d), Carolyn W. Colvin is substituted for Michael J. Astrue as the Defendant in this suit. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

1 alleging disability due to depression and mental health problems  
2 with an onset date of September 1, 2009. Tr. 156, 159-60. Benefits  
3 were denied initially and on reconsideration. Plaintiff timely  
4 requested a hearing before an administrative law judge (ALJ), which  
5 was held before ALJ Marie Palachuk on November 2, 2010. Tr. 18.  
6 Plaintiff, who was represented by counsel, medical expert R. Thomas  
7 McKnight, Ph.D., and vocational expert K. Diane Kramer (VE)  
8 testified. Tr. 32-66. On December 10, 2010, the ALJ denied  
9 benefits. Tr. 18-26. On September 6, 2011, Plaintiff submitted  
10 additional evidence to the Appeals Council and requested review of  
11 the ALJ's decision. Tr. 204-07, 325-368. The Appeals Council  
12 denied review. Tr. 5-8. The matter now is before this court  
13 pursuant to 42 U.S.C. § 405(g).

14 **STATEMENT OF THE CASE**

15 The facts of the case are set forth in detail in the transcript  
16 of proceedings and are briefly summarized here. At the time of the  
17 hearing, Plaintiff was 42 years old, divorced with three children  
18 who lived with their mother. He testified he had a ninth grade  
19 education and a high school equivalency degree. Tr. 51. Plaintiff  
20 reports he has past work experience as a laborer, a sprinkler  
21 installer, a railroad conductor, and property maintenance worker.  
22 Tr. 52-53, 161, 168. According the VE, Plaintiff's longest  
23 employment was as a sprinkler installer. Tr. 62, 161. Plaintiff  
24 testified he had last worked as a railroad conductor for several  
25 years, but was laid off and not called back to work. Tr. 52-54. He  
26 reported an attempt to return to school during the past fall, but  
27 stated it was too overwhelming for him to continue. Tr. 53.

1 Plaintiff claims back and knee pain along with depression and  
2 anxiety have made him unable to sustain work. Tr. 55-56, 58-59, 61.

3 **ADMINISTRATIVE DECISION**

4 After finding Plaintiff met DIB insured status requirements  
5 through December 31, 2008, ALJ Palachuk found Plaintiff had not  
6 engaged in substantial gainful activity since September 1, 2003.  
7 Tr. 20. At step two she found Plaintiff had severe impairments of  
8 personality disorder and polysubstance abuse disorder. *Id.* She  
9 found evidence of back pain and right knee pain did not establish  
10 more than a de minimis interference with Plaintiff's work ability  
11 and medical evidence did not establish the provisional diagnoses of  
12 depressive disorder and generalized anxiety disorder. Thus, she  
13 concluded these impairments were non-severe. *Id.* At step three,  
14 the ALJ found Plaintiff's impairments, alone and in combination, did  
15 not meet or medically equal one of the listed impairments in 20  
16 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). Tr.  
17 21.

18 At step four, the ALJ discussed the medical evidence and found  
19 Plaintiff's self-reported symptoms and limitations were not credible  
20 to the extent they were inconsistent with an ability to perform a  
21 full range of work at all exertional levels with the following non-  
22 exertional limitations:

23 The claimant has the ability to understand, remember, and  
24 follow simple routine repetitive and some complex  
25 instructions, and carry out those tasks. The claimant  
26 should have no contact with the public and minimal  
superficial contact with co-workers, best dealing with  
things rather than people.

27 Tr. 22. Based on this residual functional capacity (RFC) and VE  
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1 testimony, the ALJ found Plaintiff could perform his past work as a  
2 lawn sprinkler installer, a railroad conductor, an operating  
3 engineer, or landscape laborer. Tr. 25-26. She concluded Plaintiff  
4 was not disabled as defined by the Social Security Act during the  
5 relevant period. Tr. 20-21.

#### 6 STANDARD OF REVIEW

7 It is the role of the trier of fact, not this court, to resolve  
8 conflicts in evidence. *Richardson v. Perales*, 402 U.S. 389, 400  
9 (1971). If evidence supports more than one rational interpretation,  
10 the court may not substitute its judgment for that of the  
11 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (1999); *Allen*  
12 *v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless, a  
13 decision supported by substantial evidence will still be set aside  
14 if the proper legal standards were not applied in weighing the  
15 evidence and making the decision. *Browner v. Secretary of Health*  
16 *and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If there is  
17 substantial evidence to support the administrative findings, or if  
18 there is conflicting evidence that will support a finding of either  
19 disability or non-disability, the finding of the Commissioner is  
20 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
21 1987).

#### 22 SEQUENTIAL EVALUATION

23 The Commissioner has established a five-step sequential  
24 evaluation process for determining whether a person is disabled. 20  
25 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
26 137, 140-42 (1987). In steps one through four, the burden of proof  
27 rests upon the claimant to establish a prima facie case of  
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entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant establishes that a physical or mental impairment prevents him from engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a), 416.920(a). If a claimant cannot do his past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work; and (2) specific jobs exist in the national economy which claimant can perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497-98 (9<sup>th</sup> Cir. 1984).

#### ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff argues the ALJ (1) failed to fully develop the record or allow Plaintiff to submit relevant records from mental health providers; (2) improperly rejected medical opinions from examining psychologist Scott Mabee, Ph.D.; and (3) improperly relied on medical expert testimony. ECF No. 14 at 7-14. Defendant responds the Commissioner's decision is supported by substantial evidence and free of legal error. ECF No. 16.

#### DISCUSSION

##### A. Development of the Record

Plaintiff claims the ALJ should have obtained additional treatment records from Spokane Mental Health regarding his mental health functioning. Specifically, he contends the ALJ's record did not include mental health records after September 24, 2009, and, thus, the ALJ had a duty to request more recent treatment records to

1 properly evaluate his mental condition. ECF No. 14 at 9.

2 Generally, an ALJ's duty to supplement the record is triggered  
3 by ambiguous evidence or when the record is inadequate to properly  
4 evaluate the evidence. *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9<sup>th</sup>  
5 Cir. 2001). It is within the ALJ's discretion to develop the record  
6 if additional evidence is necessary to resolve a conflict or clear  
7 up any ambiguity in the record. The claimant must show prejudice or  
8 unfairness in the proceedings to be entitled to a remand. *Hall v.*  
9 *Secretary of Health, Ed. and Welfare*, 602 F.2d 1372 (9<sup>th</sup> Cir. 1979).

10 Plaintiff's assertions that there are additional records from  
11 Spokane Mental Health that should have been reviewed by the ALJ is  
12 not supported by his testimony or other mental health records. The  
13 hearing transcript shows that, in response to the ALJ's questioning,  
14 Plaintiff testified he did not receive treatment from Spokane Mental  
15 Health prior to 2009. Tr. 57. The record before the ALJ contained  
16 Spokane Mental Health records dated from March 2009 through  
17 September 24, 2009. Tr. 231-261. These records were considered by  
18 the ALJ in her decision. Tr. 24, 208, 234-35.

19 In addition, the record shows Plaintiff obtained records from  
20 Dr. Mabee in October 2010, which includes a September 2010  
21 evaluation. Tr. 280-95. These records were submitted to the ALJ  
22 prior to the hearing and considered by the ALJ. Tr. 25, 280-95. In  
23 his report, Dr. Mabee noted Plaintiff had not been in counseling  
24 since he was last seen in January 2010, three months after the last  
25 Spokane Mental Health record. Tr. 281, 285.

26 At the November 2010 hearing, Plaintiff's counsel requested  
27 additional time to submit additional evidence. The ALJ indicated the  
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1 record would remain open for two weeks after the hearing. No  
2 additional mental health records were submitted. Tr. 35, 65.

3 Finally, it is noted on review that the Appeals Council allowed  
4 submission of additional records on or before March 26, 2011. Tr.  
5 7. Plaintiff's representative timely submitted records from Sacred  
6 Heart Medical Center, the Community Health Association, and  
7 Deaconess Medical Center which the Appeals Council considered prior  
8 to denying review. Tr. 1-2. These records are part of the record  
9 on review by this court. *Brewes v. Commissioner of Social Sec.*  
10 *Admin.*, 682 F.3d. 1157, 1161-62 (9<sup>th</sup> Cir. 2012). The court has  
11 reviewed the submitted medical records, dated from 1984 through  
12 November 2010, and finds nothing in the new evidence that reasonably  
13 would change the outcome of the administrative proceedings. See Tr.  
14 5, 7, 297-368. Therefore, remand for consideration of new evidence  
15 is not appropriate. *Mayes*, 276 F.3d at 462.

16 Plaintiff has not established the record is ambiguous or that  
17 additional mental health records exist that warrant a remand for  
18 further development of the record. Plaintiff's argument that remand  
19 is required for consideration of additional evidence fails.

#### 20 **B. Evaluation of Medical Opinions**

21 Plaintiff argues the moderate and marked limitations assessed  
22 by Dr. Mabee and his associate Abigail Osborne-Elmer, M.S.,  
23 L.M.H.C., in June 2009 and September 2010 were improperly rejected  
24 and once credited, support a more restrictive RFC determination.  
25 He also contends the ALJ's reliance on the opinions of medical  
26 expert R. Thomas McKnight, Ph.D., was legal error. ECF No. 14 at  
27 10-12.

1 As an examining medical source, Dr. Mabee's opinions can only  
2 be rejected with "clear and convincing" reasons for doing so.  
3 *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If his medical  
4 opinions are contradicted, they must be rejected for "specific and  
5 legitimate" reasons that are supported by substantial evidence in  
6 the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (1995).  
7 Rejection of a medical source opinion is specific and legitimate  
8 where the medical source's opinion is inconsistent with his own  
9 medical records, treatment notes, and/or objective data. *Tommasetti*  
10 *v. Astrue*, 533 F.3d 1035, 1041(9<sup>th</sup> Cir. 2008); *Orn v. Astrue*, 495  
11 F.3d 625, 631-32 (9<sup>th</sup> Cir. 2007). At all times, the ALJ's  
12 explanation for weight given a medical source opinion must be  
13 supported by substantial evidence in the record. *Lester*, 81 F.3d at  
14 830-31.

15 Because Ms. Osborne-Elmer's assessment was supervised,  
16 reviewed, and endorsed by Dr. Mabee, a licensed psychologist, the  
17 court construes her opinions as those of an acceptable medical  
18 source. Tr. 213; *Taylor v. Comm'r of Soc. Sec. Admin.*, 659 F.3d  
19 1228, 1234 (9<sup>th</sup> Cir. 2011) (*citing Gomez v. Chater*, 74 F.3d 967, 971  
20 (9<sup>th</sup> Cir. 1996) (nurse practitioner, closely supervised by a  
21 physician, considered acceptable medical source for purposes of  
22 opinion weight). To the extent the ALJ rejected Ms. Osborne-Elmer's  
23 opinions because she is not an acceptable medical source, that  
24 reasoning is error. As discussed below, other legitimate reasons  
25 were given for discounting Ms. Osborne-Elmer's opinion, so the error  
26 is harmless. *Carmickle v. Astrue*, 533 F.3d 1155, 1162-63 (9<sup>th</sup> Cir.  
27 2008).



1 Independent review of the June 2009 report shows Ms. Osborne-  
2 Elmer's narrative conclusions are largely consistent with the ALJ's  
3 final RFC determination. For example, Ms. Osborne-Elmer reported  
4 objective tests administered during the evaluation suggest Plaintiff  
5 was exhibiting symptoms of "mild psychological distress." Tr. 211.  
6 She also concluded Plaintiff was still able to work - noting that  
7 despite poor attitude and a likelihood of becoming frustrated and  
8 overwhelmed, he "should be able to complete simple and relatively  
9 complex tasks with minimal problems" and "be able to complete entry-  
10 level tasks with minimal problems." Tr. 212. She recommended jobs  
11 with "minimal contact with other people, including the general  
12 public and supervisors;" and noted "his ability to persist in a  
13 regular work environment appears to be only mildly limited." *Id.*  
14 These limitations are reflected to a considerable degree in the  
15 ALJ's final RFC. Tr. 22.

16 The ALJ specifically found that moderate limitations identified  
17 in Ms. Osborne's form evaluation, Tr. 222-225, warranted little  
18 weight because they are based on Plaintiff's unreliable self-report  
19 and because Plaintiff had a financial incentive to exaggerate his  
20 symptoms to justify continuation of state benefits. Tr. 25. These  
21 are "specific" and "legitimate" reasons for assigning little weight  
22 to an examining medical opinion. *Tommasetti*, 533 F.3d at 1041;  
23 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2001). As found  
24 by the ALJ, Plaintiff's symptom complaints are not entirely  
25 credible. Tr. 23. Her unchallenged credibility determination is  
26 supported by evidence from the entire record, including examples of  
27 Plaintiff's inconsistent statements to providers, self-reported  
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1 ability to work for room and board and the fact that he stopped  
2 working due to being laid off rather than due to mental or physical  
3 impairments. Tr. 23-24.

4 In further support of the little weight given moderate  
5 limitations assessed, the ALJ referenced Ms. Osborne-Elmer's "rule  
6 out diagnosis" of possible drug and alcohol abuse that was factored  
7 into the 2009 functional limitations findings. Tr. 24-25, 224. The  
8 ALJ reasonably concluded the possibility of substance abuse was  
9 cause to discount the severity of functional limitations assessed.  
10 See 20 C.F.R. §§ 404.1535, 416.935 (factoring effects of drug and  
11 alcohol abuse in determining disability).

12 It is also noted on review that Ms. Osborne-Elmer did not  
13 expect Plaintiff's impairments to last more than nine months, less  
14 than the duration requirement for an impairment as defined by the  
15 Social Security regulations. Tr. 225; 20 C.F.R. §§ 404.1508,  
16 416.908. The ALJ's evaluation and explanation of the limited weight  
17 given "moderate" functional limitations noted in the 2009 report is  
18 supported by substantial evidence and free of harmful error.

19 Regarding the September 2010 evaluation by Dr. Mabee, the ALJ  
20 likewise gave legitimate, specific reasons for the little weight  
21 given some of his opinions. Tr. 25. Specifically, she found  
22 limitations in cognitive functioning are not supported by the  
23 "average" objective test scores reported by Dr. Mabee or the  
24 psychologist's observations that Plaintiff had no problems following  
25 test instructions or completing the test. Tr. 25. Internal  
26 inconsistencies in a medical source report is a specific and  
27 legitimate reason to reject the conclusions. *Tommasetti*, 533 F.3d

1 at 1041. Also, as found by the ALJ, objective test scores indicate  
2 Plaintiff's profile was invalid due to his over-reporting of  
3 dysfunction. Tr. 25, 286. The ALJ rationally concluded Dr.  
4 Mabee's diagnoses, based on an invalid test, would be unreliable and  
5 deserving of little weight. Tr. 25. Plaintiff's disagreement with  
6 this interpretation is not sufficient to undermine the ALJ's  
7 decision. *Sprague*, 812 F.2d at 1229-1230. The ALJ did not err in  
8 finding that the MMPI profile generated by Plaintiff's exaggerated  
9 responses and relied upon by Dr. Mabee (i.e., an individual  
10 experiencing a lack of interest, depression, who is socially  
11 introverted, disengaged, with serious thought dysfunction, and  
12 emotional distress "likely to be perceived as a crisis,") resulted  
13 in Axis I diagnoses that deserved little weight. Tr. 25, 283.

14 The ALJ's evaluation of evidence from Dr. Mabee and his  
15 associate is supported by substantial evidence. Her findings are  
16 consistent with the examiner's narrative findings and she gave  
17 legally sufficient reasons for discounting the severity of  
18 limitations noted on "check box" form summaries that accompany  
19 narrative conclusions regarding Plaintiff's ability to work. See  
20 *Molina v. Astrue*, 674 F.3d 1104, 1111-1112 (9<sup>th</sup> Cir. 2012)(citing  
21 *Crane v. Shalala*, 76 F.3d 251, 254 (9<sup>th</sup> Cir. 1996)(unexplained check  
22 box opinions disfavored). The Commissioner's final RFC determination  
23 reflects a rational interpretation of the Mabee/Osborne-Elmer  
24 evaluations, properly includes all limitations supported by the  
25 record in its entirety, and may not be disturbed.

26 **C. Reliance on Dr. McKnight's Testimony**

27 Courts have upheld an ALJ's decision to reject the opinion of  
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1 an examining physician based in part on the testimony of a non-  
2 examining medical advisor. *Lester*, 81 F.3d at 831. The analysis  
3 and opinion of an expert selected by an ALJ may be helpful in his  
4 adjudication, and the court should not second guess the ALJ's  
5 resolution of conflicting medical testimony. *Andrews*, 53 F.3d at  
6 1041(citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup> Cir. 1989)).  
7 Further, testimony of a medical expert may serve as substantial  
8 evidence when supported by and consistent with other evidence in the  
9 record. *Id.* If supported by substantial evidence, the ALJ's  
10 decision must be upheld, even where the evidence is susceptible to  
11 more than one rational interpretation. *Andrews*, 53 F.3d at 1039-40.

12 Review of the entire record, including Dr. Knight's testimony,  
13 shows the ALJ's interpretation of the evidence is reasonable and her  
14 final RFC determination is supported by substantial evidence. As  
15 clearly stated by the ALJ, Dr. Knight's opinions were not relied  
16 upon exclusively. Tr. 24. Specifically, the ALJ found,

17 Although the medical expert noted that the claimant should  
18 have no functional limitations based on test scores and  
19 mental status examinations, the undersigned has given the  
20 claimant the benefit of the doubt and included some  
psychological limitations based on the evaluations by  
Abigail Osborne-Elmer . . . and W. Scott Mabee.

21 Tr. 24. Plaintiff fails to reference specific medical expert  
22 findings relied upon by the ALJ that amount to reversible error.  
23 His general objection to the ALJ's consideration of Dr. McKnight's  
24 properly obtained expert testimony is without merit.

#### 25 CONCLUSION

26 The Commissioner's denial of benefits is supported by  
27 substantial evidence and without legal error. Accordingly,

**IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED**.

2. Defendant's Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for **Defendant**, and the file shall be **CLOSED**.

DATED May 28, 2013.

S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE